UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHARON TAYLOR BROWN, Plaintiff v. CONTINENTAL CASUALTY COMPANY, Defendant	CIVIL ACTION No. 99-6124

MEMORANDUM

August 11, 2005

Sharon Taylor-Brown brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, to challenge the termination of her long-term disability ("LTD") benefits by Continental Casualty Company ("CNA"). After a bench trial, the court found that she was disabled under the terms of her LTD policy, and entitled to receive benefits. Ms. Brown filed a petition for attorney's fees and pre-judgment interest, which CNA opposes. CNA contends that any award of attorney's fees is inappropriate, and, in the alternative, that the amount sought is too high. CNA also objects to Ms. Brown's request for pre-judgment interest. As CNA's arguments are largely unpersuasive, Ms. Brown's request will be granted, although not on precisely the requested terms.

I. Propriety of a Fee Award

Section 502(g)(1) of ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Although this discretion is vested in the district courts, not the court of appeals, the Third Circuit has delineated five factors the district courts must consider. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983). The factors are as follows:

> (1) the offending parties' culpability or bad faith;
> (2) the ability of the offending parties to satisfy an award of attorney's fees;
> (3) the deterrent effect of an award of attorneys' fees against the offending parties;
> (4) the benefit conferred on members of the ERISA plan as a whole; and
> (5) the relative merits of the parties' positions.

Id. The *Ursic* factors "are not requirements in the sense that a party must demonstrate all of them in order to warrant an award of attorney's fees, but rather they are elements a court must consider in exercising its discretion," to allow meaningful appellate review. *Fields v. Thompson Printing Co., Inc.*, 363 F.3d 259, 275 (3d Cir. 2004). The court may consider other factors, but "it must furnish a reasoned basis for its ultimate determination, and that reasoned basis must be grounded in the policy factors enumerated in *Ursic*." *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1012 (3d Cir. 1992). Here, several of the *Ursic* factors support a fee award for Ms. Brown, or are at least neutral, and, after a careful weighing of all of the *Ursic* factors, informed by general notions of equity, I find the balance to be in Ms. Brown's favor.

As to the first factor, I find that, while it does not show outright bad faith, CNA's

handling of Ms. Brown's claim indicates at least a mild degree of culpability. *See McPherson v. Employees' Pension Plan of American Re-Insureance Company, Inc.*, 33 F.3d 253, 256-57 (3d Cir. 1994) (explaining that culpability, even without bad faith, can favor a fee award under the *Ursic* analysis). The record reveals an unexplained disregard by CNA for various evidence favoring Ms. Brown's claim, and an equally mysterious reliance on rather fragile support for a denial of that claim. For example, CNA based its initial benefit denial in part on a statement Ms. Brown's rheumatologist, Dr. Krauser, allegedly made over the telephone to a CNA employee, to the effect that Ms. Brown could be released to work. In a letter to CNA, Dr. Krauser vehemently denied making such a statement, and reiterated the basis for his professional opinion that Ms. Brown remained disabled, but CNA disregarded this. Similarly, both Dr. Krauser and another experienced rheumatologist objected to CNA's reliance on the functional capacities evaluation CNA required Ms. Brown to complete, explaining in detail why such evaluations are unreliable tools in fibromyalgia cases, but CNA offered no explanation for its continued reliance on the evaluation. More broadly, CNA insisted throughout most of the administrative appeals process that Ms. Brown was not disabled because she had not provided "medical evidence" of her disability – apparently meaning objective test results or concrete physical findings – despite the fact that fibromyalgia, by definition, may offer no such evidence, the plan did not require it, and CNA had already accepted Ms. Brown's medical records as proof of disability for purposes of her short-term

disability benefits claim. Although this irrational requirement, and many other flaws in CNA's treatment of Ms. Brown's claim, might each individually be attributed to mere negligence, I find that, considering the record as a whole, those flaws reveal a bias against Ms. Brown that – however slight – is incompatible with fair and even-handed claims administration. In an ERISA plan administrator like CNA, any such bias is wrongful, culpable behavior. *See id.* Thus, the first *Ursic* factor weighs slightly in Ms. Brown's favor.

The second *Ursic* factor, ability to satisfy a fee award, does not weigh against an award here. As is common with large corporate defendants, CNA has given the court no reason to doubt its ability to satisfy an award of attorney's fees.

CNA insists that it need not be deterred from repeating its conduct towards Ms. Brown, and that the third *Ursic* factor does not support an award. However, this court has determined that CNA withheld LTD benefits from Ms. Brown over a period of more than five years, despite her eligibility for those benefits under the terms of the plan. An award of attorney's fees in this action may deter similar wrongful refusals of benefits, and encourage CNA to evaluate disability claims more thoughtfully, especially where those claims involve illnesses that, like fibromyalgia, elude objective proof. Also, a fee award may encourage CNA to correct faulty administrative decisions earlier in the litigation process. *See McPherson*, 33 F.3d at 258. This factor supports an award of attorney's fees.

The fourth factor, benefit to members of the ERISA plan as a whole, does not obviously support a fee award. Ms. Brown's suit sought to restore only her own, individual benefits, and did not seek relief on behalf of the plan, or an official change in policy that would affect other claimants. Any deterrent effect this action has would benefit other participants in CNA-administered ERISA plans – particularly those who, like Ms. Brown, suffer from illnesses that are not easily substantiated by laboratory testing or objective clinical findings. However, this effect is accounted for under the third factor, deterrence. Still, ERISA does not limit the availability of fee awards only to those who seek broader relief, so too strong an emphasis on this factor in claims for individual benefits would, I find, be in tension with the undifferentiated language of the statute. *See* 29 U.S.C. § 1132(g)(1). Although it does not favor a fee award, I find that this factor does not weigh against a fee award, but simply is of neutral impact.

The final item in the *Ursic* array, the respective merits of the parties' positions, is somewhat nebulous. The Third Circuit has explained that this factor may support a party's fee request even where the opposing party's position is not so clearly without merit as to indicate bad faith. *See McPherson*, 33 F.3d at 258. At the same time, this factor does not favor Ms. Brown simply because she prevailed in this action. *Id.* Where – as here – the first *Ursic* factor favors an award, there appears to be some logical overlap between the two. To the extent that this factor may require a more holistic equitable analysis, though, it is even more clearly favorable to Ms. Brown. As an ERISA

plan administrator, CNA wields significant power over Ms. Brown and other plan participants, who, when confronted with incapacitating illness and the financial distress that frequently accompanies it, depend on CNA for a rational and fair resolution of their claims. Even those claimants who may not be found officially disabled are often clearly ill and in distress. Here, this court has found – after several years of litigation – that Ms. Brown was disabled under the terms of her ERISA plan. Although she successfully retained counsel to assist her in pursuing her claim, the financial and emotional impact of her loss of benefits, and her attempt to restore those benefits, has been significant. At the same time, there is no indication in the record of any misconduct or undesirable behavior by Ms. Brown that might detract from the merits of her claim. This factor supports a fee award.

Although this action presents no extraordinary circumstances or egregious behavior by CNA, I find that all but one of the *Ursic* factors weighs at least slightly in favor of a fee award, and that a fee award is necessary to make Ms. Brown whole. Therefore, Ms. Brown's fee petition will be granted.

II. Rate and Hours Requested

CNA argues that the $225 hourly rate requested by Ms. Brown's counsel is unreasonable. CNA offers no evidence that this hourly fee is unreasonable, or any specific objections to counsel's proof, claiming that counsel has failed to support his request. However, the fee petition includes affidavits by two attorneys with substantial

experience in the ERISA field, both attesting that $225 is a reasonable rate. Also, according to Mr. Martin's own affidavit, Ms. Brown has already paid Mr. Martin's fees at the $225 rate, throughout this litigation, despite her rather straitened circumstances – some further confirmation that this is a reasonable rate in the local market for comparable ERISA work.[1] Absent any contrary evidence from CNA, this evidence is sufficient to support Mr. Martin's requested hourly rate.

CNA also challenges the number of hours Mr. Martin spent on the litigation in general, and specifically objects to those fees requested for preparation of plaintiff's motion for summary judgment and the instant fees petition, as well as purportedly excessive time spent preparing for trial.

CNA asks the court to reduce the amount of the fee award simply because it exceeds (by several thousand dollars) the amount of the judgment. However, this request relies on a somewhat cramped view of the outcome of this litigation: Ms. Brown's recovery includes not only the lump sum of back benefits awarded to her in the judgment, but also the reinstatement of her LTD benefits going forward. If Ms. Brown's medical condition remains unchanged, she will receive a significant sum in future benefits over the years. Even if she is someday fortunate enough to recover her health, the present security – both emotional and financial – represented by her restored benefits is no doubt

[1]Counsel also indicates that this rate is reduced from his normal fees because of professional connections he has with Ms. Brown's family.

more valuable to Ms. Brown than the relatively small amount of those benefits might suggest to CNA. Ms. Brown has been entirely successful in this litigation, and, as a general matter, the amount of the fee request does not make it unreasonable on its face.[2]

CNA also asks the court to reject Ms. Brown's claim for "thousands of dollars in fees for an unsuccessful motion for summary judgment," and for trial preparation, claiming broadly that the time spent was "excessive and unreasonable." CNA has not identified any specific instances of excessive or unreasonable work. Although both the summary judgment motion and the trial preparation did amount to a few thousand dollars in fees, the number of hours does not appear excessive, but consistent with a good faith effort to protect Ms. Brown's interests. Counsel's records account clearly for his time, and reveal no obviously unnecessary duplication of tasks or other unreasonable practices. I will not reduce the fees awarded with respect to either the summary judgment motion or trial preparation.

CNA's objection to fees requested for pre-litigation activity is somewhat puzzling.

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[2]To the extent that CNA may be requesting that the court reduce the fees awarded in some proportion to Ms. Brown's recovery, such a reduction would be inappropriate even if Ms. Brown's recovery was as limited as CNA maintains. Although the court may reduce a fee award proportionally to account for unsuccessful claims – i.e., a 50% reduction where only one of two claims succeeded – it may not reduce the award to maintain a certain ratio between the fees and the amount of a wholly successful litigant's recovery. *See Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1043 (3d Cir. 1996). Likewise, the court may not apply the *Ursic* factors in determining the proper amount of an award, but only in deciding whether any award is warranted. *See Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d. Cir. 1989).

CNA appears to have misread Ms. Brown's counsel's billing and time records, and objects to $990 in fees for such activity. In fact, the $990 figure to which CNA seems to refer, which appears in a November 11, 1999, bill to Ms. Brown, identifies the amount of a previous balance that Ms. Brown had already paid, which is not included in the fee request now before the court and therefore need not be excluded. However, the bill in question does include charges of $409.50 for pre-litigation activity involving Ms. Brown's final letter to the CNA Appeals Committee. The Third Circuit has not decided the question whether fees incurred in the administrative process may be included in an ERISA fee award. However, such requests have not generally met with approval. *See Cann v. Carpenters' Pension Trust Fund for N. Cal.*, 989 F.2d 313, 315- 17 (9th Cir.1993); *cf. Anderson v. Procter & Gamble Co.*, 220 F.3d 449 (6th Cir. 2000) (criticizing *Cann*, but following its reasoning where plaintiff sought fees for claims entirely resolved in administrative process). Even if the law of this circuit might permit such an award, the decision whether to grant pre-litigation fees would presumably be left to this court's discretion.[3] The pre-litigation administrative process, while a necessary precursor to this litigation, cannot be said to be part of it. Also, had Ms. Brown prevailed in that process, without resorting to litigation, she could not have expected to recover her attorney's fees. *See Schaffer v. Prudential Ins. Co. of America*, 301 F. Supp. 2d 383, 388

[3]Neither party has provided any argument to aid the court's exercise of this discretion.

(E.D. Pa. 2003). Finally, counsel's services in the litigation itself will be amply compensated. Therefore, even assuming for purposes of argument that an award of pre-litigation fees would be proper, the court will decline to make such an award, and will deduct from the fee award the sum of $409.50 incurred for services before the final denial of Ms. Brown's administrative appeal.

I find more persuasive CNA's objection to the fees incurred during preparation of the fee petition itself, as set forth in Exhibit F(3) to the fee petition. Ms. Brown's counsel requests compensation for 25.79 hours, at his regular hourly rate, for services rendered after judgment was issued in this action – a total of $5,802.75.[4]

Some of this time, incurred for various matters relating to "settlement," does not appear to be reasonably necessary to this litigation, since it is unclear what settlement discussions might achieve after judgment had been issued in Ms. Brown's favor. If there is a valid reason for these items to be included in a fee award, counsel's records do not reveal it; therefore, $234.00 will be deducted from the fees requested.

The remainder of counsel's post-judgment efforts – representing a total sum of $5,568.75, for 24.75 hours – pertain to the fee petition. This is plainly excessive. An attorney litigating an ERISA claim in the number of hours, and at the hourly rates, requested here, should require only minimal time to research and craft the legal argument

[4]The totals stated in Exhibit F(3) also include 0.05 hours, or $11.25, for a pre-judgment client conference. CNA has not challenged this item, so the court will not deduct it.

necessary to support a request for attorney fees.[5] Counsel was fully familiar with the history of Ms. Brown's claims, so the factual support for his request, under the *Ursic* analysis, should have been easily marshaled. In a reasonably ordered office, assembling the necessary documentation of hours would be a simple task, quickly accomplished. Moreover, that task requires no legal skill, and, even if Ms. Brown's counsel completed the work himself, a reasonable attorney in his position would bill the necessary hours at a reduced rate. Based on all of these factors, and taking into account the extravagance of the request, the court will reduce the fee to 5 hours, at the $225 rate. Accordingly, 19.75 hours, or $4,443.75, will be deducted from the requested fee amount.

The fee petition requests fees totaling $54,544.88. For the reasons explained above, although the hourly rate and most of the hours requested are reasonable, the court will reduce the requested sum by $409.50 for pre-litigation charges, $234.00 for unexplained post-judgment charges, and $4,443.75 for the fee petition. After these reductions, counsel will receive a reduced fee of $49,457.63.

III. Pre-judgment Interest

CNA disputes Ms. Brown's right to pre-judgment interest on her benefits award, as well as her proposed interest rate. However, Third Circuit precedent establishes that

[5]Exhibit F(3) also includes time related to the request for pre-judgment interest. Taking into account the quality of the briefing presented on this issue, the simplicity of the legal research required, and the slight mingling of the issues in the time records presented, the court does not differentiate this issue from the request for attorney's fees.

granting pre-judgment interest on ERISA benefits awards is a routine, ordinary practice. Pre-judgment interest serves both to make plaintiffs whole by compensating them for the loss of the use of money that is rightfully theirs, and to promote settlement and deter efforts to benefit from the delays inherent to litigation. Thus, "prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable." *Skretvedt v. E.I. Dupont de Nemours*, 372 F.3d 193, 208 (3d Cir. 2004) (quoting *Anthius v. Colt Indust. Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992)).

CNA has pointed to no exceptional or unusual circumstances that might prevent such an award here. To the contrary, an award of pre-judgment interest is essential to allow Ms. Brown to recover the full value of the benefits awarded to her in this litigation. CNA wrongfully terminated Ms. Brown's benefits in May 1999. For more than five years, CNA retained money that rightfully belonged to Ms. Brown, preventing her from using that money to pay for her family's basic expenses. To make Ms. Brown whole, CNA must restore not only the disputed benefits, but pre-judgment interest to account for the delay in their payment. Pre-judgment interest is not only appropriate, but necessary to do justice in this litigation.

CNA's objection to Ms. Brown's proposed pre-judgment interest rate has more merit. Ms. Brown suggests that the court should award pre-judgment interest at the rate applied to consumer borrowing: the average credit card interest rate during the relevant

time period. There is no legal basis for such an award.[6] In a 2003 decision addressing this issue, this court determined that the proper interest rate to apply was the statutory rate for post-judgment interest set forth in 28 U.S.C. § 1961. *Russo v. Abington Memorial Hosp. Healthcare Plan*, 257 F. Supp. 2d 784, 787 (E.D. Pa. 2003). I find no reason to depart from that conclusion now.

Under 28 U.S.C. § 1961, "interest [is] calculated from the date of entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."[7] Adapting this to Ms. Brown's situation, one would calculate the same rate with reference to the date that CNA wrongfully terminated her LTD benefits. Section 1961(b) provides that interest is to be calculated daily and compounded annually. CNA shall pay pre-judgment interest calculated under this standard.

IV.

In the accompanying order, plaintiff's fee petition and request for pre-judgment interest shall be granted, subject to the adjustments set forth herein. Plaintiff shall also receive post-judgment interest at the statutory rate.

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[6]Ms. Brown offers a case which applied a higher rate for pre-judgment interest, but this was in the context of a commercial dispute over a security agreement, not a claim for ERISA benefits. *See Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981).

[7] According to CNA, this rate in 1999 was "about 4.879%".

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ORDER

August 11, 2005

For the reasons stated in the accompanying memorandum, it is hereby ORDERED that:

(1) Plaintiff's Petition for Award of Attorney's Fees and Prejudgment Interest is GRANTED, subject to the adjustments set forth in the accompanying memorandum.

(2) Defendant shall pay plaintiff's attorney's fees in the amount of $49,457.63.

(3) Defendant shall pay pre-judgment and post-judgment interest, both calculated according to the standards set forth in 28 U.S.C. § 1961.

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Pollak, J.